

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1818.

LEFEVRE vs. BONIQUET'S SYNDICS & AL.

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**APPEAL from the court of the parish and city
of New-Orleans.**

LEFEVRE

vs.

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SYNDICS & AL.**

The syndics prayed for the homologation of the tableau of distribution, in which Cucullu, the other defendant, was classed as a mortgage creditor. The plaintiff, creditor by mortgage of the insolvent, under a deed of a later date than that of Cucullu, opposed the homologation.

An instrument, under private signature, may be recorded by the register of mortgages, on the production of the original.

A jury, to whom the case was submitted, found that the mortgage to Cucullu was executed in good faith, by an act under private signature, which was recorded in due time, on the production of the original.

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There was judgment for the plaintiff, and the defendants appealed.

Carleton, for the plaintiff. The parish court erred in giving judgment for the defendant, as the jury found that Cucullu's claim was not recorded, upon a compliance with the only formality, on which the law authorized the record of it, viz. the production of an authentic copy of the act.

The creditor, who wishes to have any act recorded, shall present, by himself, or a third person, to the register of mortgages, an authentic copy of the judgment or act from which the mortgage originates. *Civ. Code*, 466, art. 62. Mortgages, which are not recorded, or, which is the same thing, the record of which is not legally done, have not any effect against third parties. *Id.* 464, art. 52. No person can claim a privilege, unless he brings his case strictly under the law which grants it.

The register of mortgages has not the power to administer oaths—nor means of verifying the signatures of the parties to an act: the law has, therefore, imposed on him the obligation of requiring, before he records an act, the production of an authentic copy of it. Such a copy will enable any interested person to consult the act

ginal, and ascertain its genuineness. But, if the register records a private instrument, which is afterwards carried away, what means is there of access thereto?

In France, under a similar provision in the Napoleon code, the decisions of the higher tribunals have irrevocably settled the principle, that the record of a mortgage, *l'inscription hypothecaire*, is null and of no effect, if it be not attended with all the formalities which the law requires. *Dict. des arrêts modernes, verbo Inscription.*

Moreau, for the defendants. The only question in this case is, whether the record of the mortgage on the production of the original act, be not as valid as if it had been on the production of an authentic copy of it?

The plaintiff relies to support the negative answer, on our civil code and several French decisions.

We will endeavor to shew that these decisions support the affirmative: but it is proper that we should point out a striking difference between our code and the Napoleon code, on the subject of mortgages, and the recording of them.

Here a mortgage may be by a public act, or one under private signature. *Civ. Code, 458,*

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art. 5. In France, it must be by a public act. *Nap. Code*, 2127. Here the record of it is made by a transcript of the act. *Civ. Code*, 465, art. 52. Not so there—a note, furnished by the creditor, of the names of the parties, the amount, date, &c. is alone copied. *Nap. Code*, 2148. The only similarity, in the requisitions of the two codes, is the production of the act. There the production of the *original en brevet*, or an authentic copy is required. *Id.* Here an authentic copy alone is spoken of. *Civ. Code*, 467, art. 63.

Is the record void for want of the production of an authentic copy, when this has been supplied by the production of the original act?

Legislative dispositions, expressed in imperative words, do not occasion the nullity of an act in which they are disregarded, when this nullity has not been expressly pronounced. *Jurisp. Code Civ.* 65, 69. It is otherwise when prohibitive words are used. *Code Civ.* 5, art. 12.

It is true, our statute imperatively prescribes the production of an authentic copy of the act; but it does not pronounce the nullity of the record, in case this be not done.

But, the plaintiff's counsel contends that, as the statute has provided that the rank of mort-

gaged creditors shall be regulated by the date of the record of their respective acts, in the manner prescribed by law, the record is null, if it be not attended by every requisite of the law.

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This question was agitated in France, and there are several decisions upon it. According to Merlin, they amount to this: although the omission of essential formalities, prescribed for the recording of mortgages, renders the recording void, according to the principle that formalities, which are of the substance of an act, ought to be observed, under pain of its nullity, it is otherwise with regard to formalities, which, though prescribed by law, cannot be considered as indispensable, and as part of the substance of the act. 6 *Rep. de Jurisp.* 221, 222, § 5, n. 3. Merlin afterwards examines the formalities, prescribed by the Napoleon code, the omission of which is a cause of nullity, without such a nullity being pronounced. *Id.* n. 4, 7 & 12.)

According to them, almost every particularity required in the note, which the creditor is required to furnish, must be inserted therein, excepting a few, however. So the omission of the first name, (*prenom*) the profession of the party, &c. is not a cause of nullity. Such particularities, though mentioned in the law, have not been considered as sufficiently important to

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occasion the nullity of the act. Merlin thinks, that the authentic copy of the deed of mortgage, of which the Napoleon code speaks, is not of so material importance, that the authentic act, or even an unauthentic copy, may not be offered in its stead, and that this circumstance will not occasion the nullity of the registry. *Rep. de Jurisp. verbo Inscription Hypothecaire*. It appears his opinion prevails in France. 2 *Perri, Regime Hypothecaire*, 23, 24, n. 4, sur *Parl.* 2148, *du Code Napoleon*. He cites a judgment, in which it was decided, that the record of a judgment by default was valid, although made before the expedition of the judgment. 1 *U.* 34, n. 30 & 31. A report of that judgment is found in 10 *Sirey*, part. 2, 39.

Evidence of the authenticity of the act produced is required solely for the safety of the register of mortgages—it is not, in other respects, an essential formality. In cases of acts under private signature, on the production of the original, this officer is as perfectly safe, when the signature at the foot is known to him, as if he was transcribing a notarial copy of it, and more so: notaries ordinarily recording acts under private signature, without receiving any evidence of their authenticity.

MATHEWS, J. delivered the opinion of the court. This case must be decided by the application and interpretation of a few articles of our code. It is clear that conventional mortgages may be granted either by an authentic act, made in the usual form of contracts, or by an act under private signature. *Civ. Code* 453, art. 5. But, judicial and conventional mortgages cannot operate against third persons, except from the day of their being legally entered in the office of the register of mortgages: and, in order to have any act registered in that office, the creditor, who desires it, is either by himself, or some other person, to present to the register an authentic copy of the judgment or act from which the mortgage originates. *Id.* 454, art. 14, 460, art. 63.

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In applying these general provisions of law to particular cases, no obscurity or difficulty could occur, if mortgages could be granted by authentic acts alone: for of such, copies properly certified are on all occasions used instead of the originals. *Peytavin vs. Hopkins*, ante 438. But our laws recognize mortgages granted by acts under private signature, as well as sales of immoveable property and slaves; the latter of which must be recorded in the office of a notary public, in order to give them effect against third

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persons. The rules of law relating to acts of sale (although cited and relied upon by the plaintiff's counsel) it is believed, are not applicable to the registry of mortgages, and give no aid in the decision of the question under consideration. We will, therefore, examine only the law on the subject of mortgages, to every part of which it is our duty to give full force and efficacy; provided it can be done without leading to gross absurdity and palpable injustice.

Mortgages may be granted by acts under private signature or by those executed in a public and authentic form. When they are offered to be recorded the provision of the law is, that an authentic copy must be produced to the register. This provision is also strictly applicable to judicial mortgages; for the original judgment cannot be removed from the custody of the court, in which it was rendered. It may also be properly applied to conventional mortgages passed before a notary; because, as to such instruments, authentic copies are always legal evidence of the contracts which they purport to prove.

The only thing necessary to give effect to mortgages against third persons, is that they be recorded in the office of the register of mort-

gages, in the manner prescribed by law ; which is effected by presenting copies, properly authenticated, of public acts, as judgments and notarial instruments.

But, it is self-evident, that nothing could be more absurd than to require the exhibition of an authentic copy of an act under private signature—when, it is by no means clear that such a copy can, in any way, be obtained. To interpret the law on this subject, so as to require an authentic copy of a mortgage, under private signature, would be to annul entirely that provision of the code, by which such acts are authorized, and in open violation of a sound rule, for the interpretation of laws, which requires that they should be so construed, *ut res magis valeat quam pereat*.

From this view of the subject, we are of opinion that, in cases of mortgages granted by acts under private signature, it is sufficient for those, who intend to claim a benefit and privilege under them, to present the original instrument to the register, to be recorded. When recorded, as directed by law, if there be nothing fraudulent in them, they ought to be held as good and valid against third persons, without any previous recording by a notary public.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and the cause sent back to that court, with directions to allow the defendant and appellant, Cucullu, the privilege of a creditor, by a mortgage legally recorded; and it is ordered, that the plaintiff and appellee pay costs.

REBOUL vs. NERO.

In the Spanish colonies, land was not assigned to the Indians by actual survey. They were permitted to occupy a specified spot, and the law gave them a right to one league around it.

APPEAL from the court of the second district.

DERRIGNY, J. delivered the opinion of the court. A tract of land, now in the possession of the defendant and appellant, is claimed by the plaintiff and appellee, by virtue of a Spanish grant, in due form. The appellant's title is a sale from the Indians, duly authorized by the government, anterior to that grant. Both titles are, therefore, complete; and the question is only whether the second in date interfere with the first.

The land in dispute lies on bayou Plaquemine, at the distance of about twelve arpens from its entrance. It was first surveyed on the application of the widow Schlater, the grantee,

and was then represented as vacant; but a survey of the land, purchased from the Indians, by Antoine Lanclos, under whom the appellant claims, having been made shortly after, that purchase was found to include about three-fourths of the land granted. Whether the situation of that Indian purchase was correctly ascertained, is now the question.

It appears that the Chetimacha Indians, Lanclos's vendors, had been originally settled at some place much lower down the bayou Plaquemine than the spot of which Lanclos's purchase is said to be a part; but that, on account of the overflowing of their land, they went further up the bayou, from and to which place they removed, it seems, as occasion required. Which was their principal abode, and whether they finally quitted the one for the other, cannot be ascertained from the testimony, most part of which is vague and contradictory. But there is positive evidence, and that of great weight, that, at the time the Indians applied for permission to sell what they called their upper village, the situation of that land was recognized by the Spanish government to be somewhere in the neighborhood of the widow Schlater's plantation, from whence arose the clause in their bill of sale, that "the land should be taken behind hers."

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The manner of locating the lands assigned to the Indians was not by fixing their boundaries by actual survey. They obtained permission from the government to settle on a certain spot; and round that spot they were by law entitled to possess an extent of one league. *Recop. de Ind.* 6, 3, 8. In the present case, we do not see that the Indians were placed by order of the government on any particular spot towards the upper part of the bayou Plaquemine. But, what amounts to the same thing, we see that the lands, which they asked permission to sell in that neighbourhood, were recognized by the government as theirs. Where did those lands lie? They lay not far from the plantation of the widow Schlater. What was or had been the Indian village from which these lands depended? The surveyor, who measured out the widow Schlater's grant adjoining her plantation, says that he ran his line through the place where the main village or greatest number of houses stood when the Indians lived on that land; that is to say, through the very center, round which the land of the Indians extended one league. Thus it is ascertained beyond a doubt that the Indians had a claim to all the land which lay between that village and the lines of the widow Schlater.

ter's plantation, for there is not one league's distance, in any direction, from the centre of the village to any part of the lower boundary of that plantation.

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But Lanclos did not buy all the land of the Indians: he bought only thirty-five arpens front on the bayou, with the ordinary depth. Where are those thirty-five arpens located? They are undoubtedly situated where the commandant, Croker, with the assistance of the vendors, ascertained them to be. The grant to the widow Schlater had been made, as all grants were, *sin perjuicio de tercero*, provided it did not interfere with the rights of third persons. Upon a representation that it did, the competent authority, to wit, the intendant, with the advice of the assessor, ordered a verification to be made by the commandant, under the direction of the surveyor-general. That verification took place in the presence of all parties, or the parties duly called, and the grant was found to interfere, as represented. What more certain rule than this survey can this court follow to fix the boundaries between the parties; moreover, when it is considered that not only the spot in dispute, but all the intermediate space between the Indian village and the lower boundary of the widow Schlater's plantation was included with-

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It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that judgment be entered for the appellant, with costs.

Livingston for the plaintiff, *Smith* for the defendant.

CUFFY vs. *CASTILLON*.

A master, who has agreed to free his slave, for a fixed price, cannot be compelled to free him, after he has received a partial payment only.

APPEAL from the court of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant claims her freedom, and that of her children, under a contract between her former master and Cuffy, a freedman, her father. A copy of the contract comes up with the record, as well as the proceedings, which took place, in a Spanish tribunal on that contract, by which it appears that a judgment was rendered, fixing the value of each slave, who was to be manumitted, under the stipulations in the contract, and imputing a payment of 316 dollars to the benefit of one of them.

By what rule of law, or principle of justice, the Spanish tribunal acted in its decision, it is useless to enquire. The matter must be considered as a *res judicata*, and is of little importance in deciding the cause, as it is now placed before this court.

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The expressions of the contract itself show clearly that Andrew Almonaster, the defendant's first husband, and former master of the plaintiff, bound himself to liberate the slaves mentioned therein, only on the condition of receiving 3400 dollars, the price of their liberty, stipulated between him and Cuffy. It does not appear that the sum or any part of it was paid to him or his representatives, except 316 dollars, which were imputed on the price of John Baptist, one of the four slaves named in the contract, by the judgment of the Spanish tribunal, from which no appeal appears to have been taken, and which fixes and determines the appropriation of that sum. But even that sum, were it now to be considered as a general payment, on the contract, for all the slaves named in it, could not avail the present plaintiff.

Her counsel relies much on principles of the Roman law; *quoties dubia libertatis interpretatio est ff. 50, 17, 20*, and the law *de seruo suo nammis empto*, 40, 1, 40, in which, among other

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things it is declared, § 10, that, although the whole price of his freedom should not be paid by the slave, nevertheless he acquires it, if the deficiency be afterwards supplied by his labor, or if he should acquire it by his industry. As to the rule requiring the interpretation, in doubtful cases, to be in favor of freedom, it is sufficient to observe that no one rule of interpretation in law or contracts ought ever to be considered of so much consequence, as to exclude the operation of others, equally founded in justice and common sense. Freedom must not be so favored by interpretation, as to depart entirely from the intention of the contracting parties, apparent on the contract itself.

The law which authorizes the *residue* of the price to be supplied by the labor of the person claiming his freedom, as purchased with his own money, or by the circumstance of acquiring property, is, in our opinion, (and as insisted on by the counsel of the defendant) applicable only to such persons as are made free *instantly*, on condition of paying a certain sum *in futuro*. In such a case, when a part of the price of the person is paid, and the freedman continues to labor for his former master, the value of his labor may be fairly imputed, as a payment: or if he be suffered to act as a free person, and ac-

quire property, he may be compelled, by legal proceedings, to complete the payment of the price of his freedom.

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But, in the case under consideration, the master contracted to give the deed of emancipation of the children of Cuffy, when the latter should have satisfied and paid him 2400 dollars. This mode of expression demonstrates the intention of the master to liberate them *in futuro*, after the fulfilment of the condition, on which alone they were to be freed, viz: the complete payment of the price of their freedom. On tendering the full amount of the sum for which he promised to give them their freedom, (at any time perhaps) they would be entitled to demand their freedom. But, without payment, or an offer to pay, they surely can claim no benefit, under the contract on which they rely. This opinion we believe to be in conformity with every just rule for the interpretation of contracts.

It is supported by the authority to which the plaintiff's counsel has resorted *ff. 40, 7, de statuliberis*. In the fifth paragraph of the third law which declares that the *statuliber* must fulfil the condition on which he is to be entitled to his freedom, provided he be not hindered, and the condition be possible; it is laid down that if the condition on which the slave is to be free,

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be the payment of a certain sum to the heir of the master, and he does not pay the whole, he shall not obtain his liberty. *Si decem jussu dare & liber esse, quinque det; non percipiat at libertatem, nisi totum det.*

We are of opinion that there is no error in the judgment; and it is therefore ordered, adjudged and decreed that it be affirmed with costs.

Young for the plaintiff, *Moreau* for the defendant.

DOUBRERE vs. PAPIN.

APPEAL from the court of the first district.

The judgment is valid, if the reasons of giving it appear, on reference to the petition.

MATHEWS, J. delivered the opinion of the court. This is an appeal from a final judgment rendered against the bail of the defendant.

The case comes up on a bill of exceptions to the opinion of the district court, overruling the opposition of the counsel of the bail, on a rule to shew cause why judgment should not be entered against him.

The causes shewn were, that judgment had been rendered for the defendant on the 17th of September, 1817, and an appeal taken by the plaintiff, which did not suspend the execution, and so the bail was discharged—and that the

judgment rendered against the defendant is void, because the judge did not give his reasons for rendering it; so that bail cannot be made liable on a void judgment.

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The first of these causes is entirely without foundation. It appears from the record that no judgment was rendered for the defendant, since the persons who are now prosecuted as his bail, bound themselves as such.

The second cause was properly overruled. For, admitting that a judgment, without reasons, is void, (on which we give no opinion,) yet it appears, in examining that of the district court, in this case, that it is supported by a reason or motive, the best, perhaps, that could have been given: proof that the defendant owed the amount. It is true, that this reason is not given in *his verbis*—but, taken with a proper reference to the plaintiff's petition, it amounts to this. *Lacerty & al. vs. Gray & al. & Martin*, 463, *Sierra vs. Slott*, *id.* 316, *Urquhart vs. Taylor*, ante 203, *Porter vs. Adams*, ante 201.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Livingston for the plaintiff, *Moreau* for the defendant.

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APPEAL from the court of the first district.

If the first citation be not served, the appellant is entitled to an *alias*.

A clerical error, in describing the return day, will not prejudice the party.

MARTIN, J. delivered the opinion of the court. In this case, the district judge made the appeal returnable on the 6th of April last—the citation was irregularly served, and the appellant took out a new citation, returnable on the first day of May, instant, citing the appellee to appear on an appeal, returnable on the same day. The appellee prayed the citation might be set aside, as there was no appeal returnable on that day.

We are of opinion that, in case the first citation be not served, or be irregularly so, the appellant may take, under the 9th section of the act of 1813, a new citation, returnable on the first day of the next succeeding term—that in the present case the error of the clerk in irregularly describing the appeal, as returnable on the day on which the citation was by law to be made returnable, is a clerical error, which cannot work any disadvantage to the parties.

It is therefore ordered, adjudged and decreed that the appellant take nothing by his motion.

Hennen for the plaintiff, Seghers for the defendant.

DURNFORD vs. BARITEAU.**APPEAL from the court of the first district.**East'n District.
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The plaintiff obtained a writ of seizure on a notarial instrument, executed by the defendant, who had a provisional injunction, on a plea of payment. The parties proceeded to trial, and there was judgment for the plaintiff—the defendant appealed.

If illegal interest has been paid, the difference between five per cent. and the rate at which it has been paid, must be imputed on the principal.

The whole evidence came up with the record, and consisted only of the deposition of a witness. He deposed that, about two years ago, the plaintiff desired him to call on the defendant for the principal of the claim in suit; but the defendant always put him off—that he knows the defendant paid the interest, at the rate of two per cent. per month, during the last four months—that he has given a receipt, dated April 7, 1817, for two months of that interest—that the plaintiff told the witness the defendant owed him for some syrup—that he knows the three endorsements on the notes produced to be in the proper handwriting of the plaintiff—that the plaintiff never spoke to him of the interest paid by the defendant—that he never received any note for the plaintiff from the defendant—that

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the plaintiff negotiated his own affairs with the defendant—all which he knows, having frequently seen the defendant at the plaintiff's.

The notes produced were of the defendant to the plaintiff, endorsed, in blank, by the latter, one of December 31, 1816, for \$449 16, payable February 4, following—another, of February 19, 1817, for \$467 79, payable on the 4th of April, 1817—the last of the 4th of April, 1817, for \$472 34, payable one month after date.

At the trial, the defendant offered to prove, by a person who had been agent for the plaintiff for the three last years, that the plaintiff is a noted usurer, and did no other business but to lend money at an illegal interest, and to shew what interest the plaintiff is in the habit of taking, in his transactions with the people. The court refused to examine the witness, and the defendant excepted to its opinion in this respect.

Morel, for the defendant. The defendant has paid the plaintiff interest above the legal rate, and therefore, in conformity with the civil law, is entitled to a credit on the notes for the amount thus paid beyond the legal interest. *Les interets payes au dessus du taux legal sont sujets a repetition (par imputation sur le capital qui est encor du.) Dictionnaire du Digeste*

100, *verbo conductio indebiti*, n. 10. *Justin. digest*, 12, 6, 26, with the commentary of *Gode-froy, Pothier Pandectae Justinianae*, 22, 1, n. 26. *Voet in Pandectis*, 12, 6, n. 13. 1, *Clef des Lois Romaines*, 507, *verbo, Interest*. 5 *Rodriguez Digesto Teorico Practico*, 126. 7 *Promptuarii Mullesi*, 703, n. 11. The amount paid is proved by the receipt of the plaintiff's agent, and by the notes of the defendant in favor of the plaintiff, which have been paid, and are now in the hands of the defendant. And as there was no written convention or other account of the interest, it must be reduced to the legal rate, five per cent. per annum.

If the defendant be entitled to credit, on the principal, for the excess of interest he has paid, he had a right to shew the ordinary rate, at which the plaintiff lent his money to others, and the judge erred in rejecting the witnesses offered for that purpose.

Hennen, for the plaintiff. Whatever payment of interest has been made to the plaintiff, above the legal rate, was for the forbearance of exercising a legal right of enforcing payment; and that being a valid consideration founded in equity, the defendant has no right to recall that payment: *volenti non fit injuria*. At all events,

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the interest can be reduced only to 10 per cent per annum, as there is written evidence between the parties of an agreement to pay more than the legal rate. The notes offered in evidence by the defendant, cannot be considered as a payment of the present demand: they carry on their face a consideration, and unless proof be produced that they were given in payment of the claim, the court is bound to consider them as the payment of some other debt.

The judge did not err, in rejecting witnesses offered to prove what interest the plaintiff may have received in other cases. On the plea of payment by the defendant, the plaintiff could not imagine that it was necessary for him to be provided with testimony to contradict the witnesses offered. Indeed if usury had been pleaded, the testimony could not have been received.

MARTIN, J. delivered the opinion of the court. We are of opinion that the district court did not err in rejecting the evidence thus offered. The defendant has relied on no other plea than that of payment. This plea may give the plaintiff sufficient warning, that the defendant contends that he has received something which ought to go to the discharge or reduction of the

claim; but it cannot so far put him on his guard as to induce him to come prepared to defend his general conduct, or to meet any charge, in respect to his transactions with other people.

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The defendant contends that the court below erred in refusing to consider three notes which he introduced, as payment of monies in discharge of the bond, and in refusing to allow a deduction for the excess of interest, or illegal rate of it, proven by the witness.

We cannot see on what grounds it can be ascertained or presumed, that the notes were given in part payment of the plaintiff's claim. A note is *prima facie* evidence of a new debt; if its object be the payment of a former one, that circumstance must be proven.

The defendant having proven payment of interest, at the rate of eight per cent. for four months, (two per cent. per month,) while the legal interest during that period, (at five per cent. a year,) is only one and two-thirds per cent.—the excess, six and one-third per cent. is a payment which ought to be deducted from the principal. We cannot agree that the previous interest being presumed or proven to have been paid, must be presumed to have been so, at the rate of two per cent. per month. Neither can we think, with the plaintiff's counsel, that

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the defendant cannot avail himself, under the plea of payment of what, in the opinion of the counsel, is hardly available on the plea of error. Under a plea of payment, the defendant may give evidence of any money paid by him to the plaintiff, and the court will deem it to have been paid in discharge of the debt, if the plaintiff cannot show that he has a right to apply it otherwise.

Neither can we allow conventional interest at any rate between five and ten per cent. a year, because conventional interest must be fixed in writing. *Civ. Code, 498, art. 52.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and this court doth further order, adjudge and decree, that the defendant be allowed the payment of two hundred and six dollars and sixty-six cents and two-thirds, and that this sum, being deducted from three thousand one hundred dollars, the plaintiff do recover from the defendant the balance, viz. two thousand eight hundred and ninety-three dollars and thirty-nine cents and one-third, with costs in the inferior court, and interest on the said balance, at five per cent. from the institution of the suit till paid—and

that the plaintiff and appellee pay the costs of East'n District.
the appeal. May, 1818.

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DELACROIX vs. ORLEANS NAVIGATION CO.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court.* On the 10th of October, 1812, the Orleans Navigation Company contracted with the late Daniel Clark, for the digging of the canal Carondelet and its basin. No time was fixed within which the work was to be performed; but it was covenanted that the undertaker should employ at the said work, until its completion, not less than sixty labourers. Daniel Clark having died shortly after, the contract was, with the consent of the company, assigned by his executors to Francis Dussauau Delacroix, who thereby put himself in the place and stead of said Clark.

It appears that Dussauau Delacroix neglected to keep at the said work the stipulated number of negroes, owing to which the work suffered

If it be stipulated that a certain part of the price of a work shall be paid, when one third of it is done, & another when the second third is done, this is not such a division of the work as to preclude the employer from complaining of any deficiency on any part of it, after the two first payments are made,

* MARTIN, J. did not join in this opinion, being a stockholder of the company.

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much delay. After several remonstrances on the subject, the company, on the 23d of December, 1816, brought suit against him for damages, in the amount of his bond, and for the rescission of the contract. Propositions for some amicable arrangement were then made; and, after some debate, it was finally agreed between the parties that, "provided Dussauin Delacroix would place eighty good working negroes in the canal, on or before the 15th of January ensuing, and have the said number constantly employed in said work until it should be completed, agreeably to contract, the suit instituted against him would be suspended; the company reserving to themselves the right of bringing it to trial, at any moment they might discover that the said number of eighty negroes were not regularly and constantly employed." Upon these terms then, the undertaker went on with the work, and was, if he should adhere to them faithfully, to be exonerated from any responsibility for past neglects and delays.

It appears that, from the date of this compromise, the work was so carried on as not to incur the disapprobation of the company, and the 2d day of April, when the undertaker, pretending that the work was completed, wrote to the company to deliver it, and withdrew the

greatest number of his hands, leaving only such as were necessary to remove the dam, at the entrance of the canal into the basin.

On the 5th of April, a committee, appointed by the company, to examine the works which the undertaker offered to deliver, found them incomplete and defective; whereupon they determined to prosecute their suit to trial—and Dussau Delacroix, having on his side brought suit for the last instalment of the price of his undertaking, both causes were consolidated and tried together. With a verdict and judgment, reducing Dussau Delacroix's claim to fifteen thousand, instead of sixteen thousand dollars, amount of said instalment, both parties have been dissatisfied, and have appealed.

The first question to settle is, whether the undertaker did or did not fail to comply with the stipulation last agreed upon between the parties, whereby he was bound to keep constantly employed, at the canal, eighty good negroes, until the completion of the work, agreeably to contract; for, if he has fulfilled that engagement, he is discharged from any responsibility for past delays. On this point, then, we are satisfied that, until the 2d of April, 1847, the undertaker did perform that obligation. The testimony of the overseer, which we see no

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good reason to disbelieve, leaves no doubt as to that subject: and, although he states that there were always some of the negroes, sometimes as many as twenty-five or thirty, sick, as it does not appear how long the same individuals remained disabled by sickness, no reproach can attach to the undertaker for not having replaced them—that evidence we would deem sufficient, even if standing alone, to establish this fact; but the silence of the company, who had declared their intention to prosecute the case, at any moment they might discover the required number of negroes were not regularly and constantly employed, is a circumstance strongly corroborative of the testimony by which it is tested, that the required number was there.

On the 2d of April, the undertaker wrote to the company that the work was completed, and called upon them to receive it: at the same time, he withdrew the greatest number of his hands. It appears, however, that something still remained to be done, and that a part of the work, to wit, the basin, was not made according to the dimensions fixed by the contract. One of the answers of the undertaker to this is, that he had formerly delivered to the company the two first thirds of the work, in which the defects complained of are to be found—that the con-

pany had received them and paid for them—and that, as to the last third, it was not pretended, that there was any defect in it.

This position does not appear to us to be supported by the expressions of the contract; it is there stipulated, that a proportion of the whole price shall be paid when one-third of the work shall have been done—another proportion when the work shall have progressed two-third parts—and the remainder when the whole shall be complete and finished. This is evidently intended for nothing more than fixing the terms of payment. The work itself is not divided into parts; even the manner of carrying it on is left at the disposal of the undertaker. If, instead of digging the canal to the whole depth, as he advanced, he had chosen to dig the whole length to a certain depth, at first—or if, instead of beginning at one end and advancing regularly, it had suited him to dig separate parts at first, no such thing as a delivery of one-third could have taken place. Neither can any such delivery have been made, according to the manner in which the work appears to have been conducted. No determinate and fixed parts of the canal and basin were measured out as composing the first and second thirds of the work. The parties themselves do not seem to know

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where that first and where that second third ended. No formal delivery of any part was made, and no discharge given. The money was paid, according to contract, when the work was considered as having progressed, first to one-third, and then to two-thirds, of the undivided whole, and the last payment was to be made when the whole should have been complete and finished.

We think therefore, that on completing and finishing the work, the delivery of the whole was to take place, and that for any defects, then found in any part of that whole, the undertaker is answerable. We will now proceed to examine if there are such defects, and in what they consist.

It is in evidence that, when the undertaker tendered the canal as finished, some small bars, two of them the remains of dikes, still obstructed the navigation, and that, in the whole length of the canal, there was dirt, at several distances, which had fallen from the caving in of the banks. The whole of that work was undertaken and finished, by one of the witnesses, for eight hundred dollars; so that making allowance for such filling as may have been caused by the crasse of 1816, and for the tumbling in of the banks, nothing can be absolutely ascribed to the neglect of the undertaker, but his having left

some inconsiderable remains of the dikes, at East'n District
both ends of the canal. May, 1818.

As to the basin, it appears that it falls short of the dimensions fixed by the contract; but, when it is considered that the undertaker received his measurement from the engineer of the company, and that, from the mouth of that engineer himself, we hear that the company gave him orders to change the dimensions of the basin, on the north side, we can no longer view the description in the contract as the invariable rule of the parties. Yet the company had complained of this deficiency, on the north side of the canal, until the declaration of their own agent compelled them to give up that part of their claim. If we add to this circumstance the presumption resulting from their long silence ever since the digging of the canal was finished, much doubt must arise, as to the cause of the deficiency found on the south side. The engineer's de position on that point does not remove that doubt; he says that he measured the east line to its end on the south, and could not be mistaken in that measurement, as he employed, for that purpose, a chain of sixty feet; that Joublane, the overseer of Dussau Delacroix, fixed piquets along the line as he measured it, but that he did not put a stake at the south end,

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on account of a bridge in the way to which the stake would have been, and that he accordingly fixed one within the line to serve him as a mark. But he also states that he gave to Joubert a perpendicular on the south side, and that the south line measured one hundred and eighty feet. He does not say that he picketed that south line: but, by referring to the contract, we see that it was his duty to do so, and see it done. If he did, the presumption would be, that his marks were attended to; if he did not, the neglect is his, and consequently the company's. To the uncertainty resulting from this testimony must be added the diffidence with which it ought to be received: for the witness, however fair and honorable his character, was called upon to declare whether or not he had committed a mistake, the result of which was of considerable prejudice to his employers, and in such a situation, must naturally be considered as under the influence of some bias in favor of his own accuracy.

Upon the whole, we are of opinion that the damages granted by the jury to the company under a full view of all the circumstances of the case, do not so evidently appear out of proportion with the injury, as to authorize this court

either to increase them, or to remand these cases East'n District
to be tried anew. May, 1818.

It is therefore ordered, adjudged and decreed
that the judgment of the district court be affirm-
ed; and that the costs of these appeals be sup-
ported equally by the parties.

Signed for the plaintiff, *Ellery and Duncan*
for the defendants.

ROBIN'S WIDOW & AL. vs. HIS EXECUTORS.

APPEAL from the court of probates of the
parish of New-Orleans.

DERRIGNY, J. delivered the opinion of the
court. On the 30th October, 1816, the execu-
tors of the late Andrew Robin, appellees in this
case, presented their account in the court of pro-
bates of New-Orleans: the account was contract-
ed by the widow and heirs of the deceased, ap-
pellants, and after a course of proceedings which
it is unnecessary to mention here, the court of
probates rendered a final decree, by which the
appellees were ordered to pay to the appellants,
over and above the balance by them acknow-
ledged, a sum of 1682 dollars, and 85 cents,
and also to deliver into their hands the several

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If the execu-
tors present
their accounts,
which are con-
tested, and a
decree be made
for the balance;
and they after-
wards, receive
monies of the
estate, they
cannot present
an additional
account, in-
cluding these
monies, and
some of the
items in the
first account,
with additional
charges, not
before produc-
ed.

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items of reprise, or uncollected debts, mentioned in their account.

It appears that, pending the proceedings for the approbation of the account, to wit: on the 11th March, 1817, the appellees received from the sheriff the amount of a judgment, which figured in their account among the uncollected debts—and that this sum, not being comprehended in the balance which was struck in favor of the appellants by the decree of the 30th of April, 1817, the appellees presented an additional account, in which they included that sum, together with several of the items already mentioned in the decree, and some additional charges, not yet produced. The appellants objected to this proceeding, alleging that the jurisdiction of the court had ceased from the moment that the decree of the 30th of April had been rendered—and that for all sums or articles not delivered, the appellees were bound to settle with them, without any further interference of the court. Their objection was overruled, and another decree was rendered from which they have claimed the present appeal.

We think that the decree of the 30th of April, awarding a balance in favor of the appellants, and ordering the appellees to pay to them, as also to deliver into their hands all the

sums of uncollected debts, was a final settlement of the curatorship of the appellees, which put an end to the jurisdiction of the court of probates; and that, after such a judgment, they had no right again to bring the appellants into court, to hear new accounts and debate new charges.

It is, therefore, ordered, adjudged and decreed, that the decree of the court of probates, bearing date the 11th of June, 1817, be annulled, avoided and reversed; and that the appellees pay the costs of this appeal, and the costs accrued in the court of probates since the decree of the 30th of April.

Seghers for the plaintiffs, *Morel* for the defendants.

GENERAL RULE.

Every party, appellee, having been duly cited to appear in this court, shall be allowed five clear days, from that of the filing of the appeal, to answer thereto; and, if the said party shall not answer within that period, the cause may be set down by the appellant and this court will proceed to hear it *ex parte*, at the time appointed. See 1 *Martin's Digest*, 442, n. 6.

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The appel-
lee must an-
swer within
five days after
the appeal is
filed.